Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-728

HAROLD FRANKS and JOHNNIE LEE,
Petitioners,

vs.

BOWMAN TRANSPORTATION, INC., and INTERNATIONAL UNION OF DISTRICT 50, ALLIED AND TECHNICAL WORKERS OF THE UNITED STATES AND CANADA, AND ITS LOCAL NO. 13600,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT BOWMAN TRANSPORTATION, INC., IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

The question as stated by petitioners, under the present facts, requires the additional question whether the Court of Appeals correctly held that the District Court did not abuse its discretion in refusing to grant seniority from the date of their rejection, to black applicants denied employment as road drivers.

STATEMENT OF THE CASE

Petitioners' statement of the case is substantially correct. However, this respondent does not agree entirely with the statements concerning the holdings of the courts below.

In denying retroactive seniority to rejected applicants, the District Court stated the same reasons which were given for its denial of class back pay. It deemed that such relief was not warranted in class actions, and it would bypass the statutory administrative prerequisites to personal suit and thus thwart the Act's emphasis on conciliation and private settlement. Also, the court stated that it was denying this remedy, along with class back pay, in the exercise of its discretion (A53-A54).

The Court of Appeals reversed the holding that either Rule 23(b)(2) or Title VII prohibits back-pay awards to unnamed class members. Since it appeared that the District Court had exercised its discretion under a view of the applicable law which the appellate court deemed erroneous, the latter court vacated the portion of the decree denying back pay to the class, and remanded for reconsideration of this issue (A37-A40). The court did not decide that class members were entitled to back pay.

The Court of Appeals refused to grant application-date seniority to class members who were denied employment. The court stated the view that this extension of such constructive seniority as a remedy was not permitted under section 703(h) of Title VII[1] (A30). This view was not relied upon by the District Court. Despite its statement of this view, the holding of the Court of Appeals was that the District Court "did not abuse its discretion in

1. 42 U.S.C. §2000e-2(h).

refusing to create constructive seniority for black OTR applicants who were rejected as a result of Bowman's discriminatory policy" (A31).

ARGUMENT

It is conceded that the view of the Fifth Circuit may be incorrect concerning the effect of section 703(h) upon the seniority remedy sought by petitioners. The Sixth Circuit has expressly disagreed with that view in *Meadows* v. *Ford Motor Co.*, ... F.2d ..... (1975), holding that the grant or denial of retroactive seniority to rejected applicants was a matter within the discretion of the trial court.

The difference between the circuits thus relates to the effect of section 703(h) as an obstacle to the remedy in question. The two views lead to the same conclusion on the present facts. The Fifth Circuit held that the District Court did not abuse its discretion in denying the requested remedy. Since the Sixth Circuit held the remedy to be discretionary with the trial court, the principle of *Meadows* leads to the same result. The difference between circuits on the effect of section 703(h) becomes academic in relation to present facts.

The view of this respondent concerning the applicable legal principle is in substantial accord with that stated in the last paragraph of the memorandum filed for the United States and the EEOC:

> The issue here is a narrow one. It is not whether full seniority credit for all purposes must be granted to all members of the affected class who are ultimately hired by the company; it is whether some form of seniority credit *may* be granted in appropriate circumstances to eliminate the effects of past hiring

discrimination. The resolution of the issue will not require this Court to determine the precise form that such relief should take in this case. As the Sixth Circuit recognized in *Meadows, supra,* that task, which requires a careful consideration of all the competing interests at stake, properly "lies in the first instance with the District Judge" (slip op. at 19).

Like the government, this respondent does not argue that retroactive seniority may not be granted as a remedy for applicants wrongfully rejected. Respondent states that the matter is within the discretion of the district judge, who has the task of considering the competing interests at stake. The district judge exercised his discretion in the present case, and the Court of Appeals found no abuse of discretion. Those rulings should conclude the issue under the view of the applicable law taken by any of the parties.

The issue thus reduces itself to a question of possible abuse of discretion by the District Court. Where that exercise of discretion has been sustained on appeal, the question is hardly substantial enough to warrant this Court's review. The court's discretion to withhold a particular remedy, entirely consistent with *Meadows*, supra, has been frequently sustained in cases under Title VII.[2]

2. In *Thornton* v. *East Texas Motor Freight, Inc.*, 497 F.2d 416 (6th Cir. 1974), the court sustained the discretion of the district court to withhold seniority relief from some discriminatees, and held that the award of back pay rested within the sound discretion of the trial judge. Back pay was denied in the following cases: *U. S.* v. *St. Louis-San Francisco Railway Co.*, 464 F.2d 301 (8th Cir. 1972), cert. den'd 409 U.S. 1116 (1973); *U. S.* v. *N. L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973); *Manning* v. *Int'l Union*, 466 F.2d 812 (6th Cir. 1972), cert. den'd 410 U.S. 946 (1973); *United Steelworkers of America, Local 1104* v. *U. S. Steel Corp.*, 478 F.2d 1255 (6th Cir. 1973); *LeBlanc* v. *So. Bell. Tel. & Tel. Co.*, 333 F.Supp. 602 (D.C. La. 1971), aff'd per curiam 460 F.2d 1228 (5th Cir. 1972), cert. den'd 409 U.S. 990 (1972); *Kober* v. *Westinghouse Elec. Corp.*, 480 F.2d 240 (3d Cir. 1973); *Rosenfeld* v. *So. Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971).

Petitioners do not assert a conflict among circuits on the issue involved here. The cases cited by petitioners (petition, pp. 16-17), arising under the National Labor Relations Act, do not deal with the question. Although the courts have enforced orders of the NLRB requiring reinstatement of rejected applicants with seniority, or "without prejudice to seniority", the courts did not rule upon the seniority remedy or upon the Board's discretionary power to grant or deny it. See *Atlantic Maintenance Co.* v. *N.L.R.B.*, 305 F.2d 604 (3d Cir. 1962); *N.L.R.B.* v. *Lamar Creamery Co.*, 246 F.2d 3 (5th Cir. 1957); *N.L.R.B.* v. *Cone Bros. Contracting Co.*, 317 F.2d 3 (5th Cir. 1963). In *N.L.R.B.* v. *Phelps Dodge Corp.*, 313 U.S. 177, 195-198 (1941), this Court, in sustaining the Board's order directing the employment of rejected applicants with back pay, acknowledged that these remedies were discretionary with the Board. The Court's statement on the latter remedy (313 U.S. at 198) is equally applicable to the seniority remedy here: "The remedy of back pay . . . is entrusted to the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations."

In *N.L.R.B.* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969), this Court reversed the Court of Appeals' modification of an NLRB back-pay order. The appellate court had eliminated back pay after a certain date because of the Board's "inordinate" delay. This Court held that the Court of Appeals exceeded the narrow scope of review provided for the Board's remedial orders. Again, the emphasis is upon the discretion of the Board, whose position is somewhat analogous to that of the District Court. In

none of the other cited cases did this Court make a ruling which touches upon the present issue.[3]

If this case is deemed to present an issue of the availability of the seniority remedy under applicable law, apart from the district judge's discretion to deny the remedy, it is this respondent's position that the remedy is not appropriate, not because of section 703(h), but substantially for the reasons given by the District Court. In this regard the case presents generally the same questions which are raised by this respondent in its petition for certiorari in No. 74-424 directed to the rulings below concerning the award of back pay to unnamed class members. Respondent submits that the seniority remedy, like class back pay, is not appropriate in a Rule 23(b)(2) class action, particularly where notice has not been given to identifiable class members. See *Eisen* v. *Carlisle & Jacquelin,* 40 L.Ed. 2d 732 (1974). Furthermore, the remedy is not available to class members with respect to whom a charge has not been filed under Title VII with the EEOC. A contrary holding has the effect, as the District Court noted, of bypassing the statutory administrative prerequisites to personal suit and the emphasis on conciliation and private settlement.

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3. *Golden State Bottling Co.* v. *N.L.R.B.*, 38 L.Ed. 2d 388 (1973), dealt with the liability of a successor employer who acquired the business after issuance of the Board's reinstatement and back-pay order. *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), dealt with questions of reinstatement of economic strikers, but not with the present question of remedy. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953), sustained the validity of a contractual provision giving preemployment seniority credit for military service. The questions in *Southport Petroleum Co.* v. *N.L.R.B.*, 315 U.S. 100 (1942), and *Aeronautical Industrial District Lodge* v. *Campbell*, 337 U.S. 521 (1949), are even more remote to present issues.

The question presented here is closely related to the questions raised in No. 74-424. That petition for certiorari has been denied, but this respondent is presenting a motion for leave to file a petition for rehearing. Although the present question, standing alone, appears not to be of sufficient importance to warrant review by this Court, it is appropriate for review in conjunction with the questions presented in No. 424. If that petition for certiorari is granted, this respondent does not oppose the granting of the instant petition.

Respectfully submitted,

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